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SYARIKAT BEKALAN AIR SELANGOR SDN BHD v. TONY PUA KIAM WEE

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
B HASAN LAH FCJ
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
[CIVIL APPEAL NO: 02(f)-31-03-2014 (W)]
21 SEPTEMBER 2015

C

TORT: *Defamation – Defences – Reynolds privilege – Whether defence only available to journalist – Whether privilege available to anyone who publishes or discloses material of public interest – Test of responsible journalism – Whether Court of Appeal erred in application of test – Whether sufficient to have honest belief in* D *truth of statements made – Whether defendant had taken responsible and fair steps to gather, verify and publish information – Justification – Whether defendant properly pleaded Lucas-box meaning – Whether impugned words were capable of bearing reasonable meaning ascribed by defendant*

E Syarikat Bekalan Air Selangor Sdn Bhd ('the plaintiff') was the sole supplier and distributor of water in Selangor and the Federal Territories of Kuala Lumpur, while the respondent ('the defendant') was a Member of Parliament and also a member of the Selangor State Government Water Review Panel. The plaintiff claimed that it had been disparaged in its business reputation and commercial credit by certain words uttered by the defendant at a forum F ('the impugned words'), which were published in an article in the Nanyang Siang Pau. Consequently, the plaintiff commenced legal proceedings for defamation against the defendant. It was the plaintiff's case that the impugned words were in their natural and ordinary meaning and by way of innuendo libellous, in that, they meant that the plaintiff had insufficient funds to pay G its debts, was incompetent in handling its business operations such as the replacing of water pipes and that the plaintiff was making improper claims to raise water tariffs for its own benefit. The defendant did not dispute that he uttered the impugned words but pleaded that the said words were not defamatory of the plaintiff. In his defence, the defendant raised the defence of qualified privilege, particularly *Reynolds* privilege and the defence of H justification. The High Court Judge found the impugned words were libellous of the plaintiff and awarded a sum of RM200,000 as general damages with interest and costs to the plaintiff. Aggrieved, the defendant appealed to the Court of Appeal. The Court of Appeal allowed the defendant's appeal and found that the impugned words were defamatory only to the extent of I imputing that the plaintiff had insufficient funds to pay its debts and was

incompetent in handling its business operations since it could not pay its debts. The Court of Appeal also went on to find that the defendant was entitled to succeed on the defence of qualified privilege as he had satisfied the duty and interest tests as propounded in the case of *Reynolds v. Times Newspapers Ltd* ('*Reynolds* case') and that the defendant had proven his defence of justification. Dissatisfied, the plaintiff applied for and obtained leave to proceed with the present appeal against the decision of the Court of Appeal, which was premised on five questions of law. The questions of law were concerned primarily with how and when a defendant could rely on the *Reynolds* privilege and the defence of justification.

Held (dismissing the appeal)
Per Azahar Mohamed FCJ delivering the judgment of the court:

(1) Although the defendant was not a journalist who had personally penned the article, the *Reynolds* privilege defence was still available to him. The *Reynolds* privilege or the public interest defence should not be synonymous with journalists or media publications. In fact, on the ground of public interest, the privilege should be extended to anyone who publishes or discloses material of public interest in any medium to assist the public better comprehend and make an informed decision on matters of public interest that affects their lives. At the same time the right of freedom of expression on matters of public interest is not absolute but should meet the test of responsible journalism. Hence, the *Reynolds* privilege was predicated on public interest and responsible journalism. In the present case, the impugned words uttered by the defendant were on a matter of public interest, in that they concerned the operation and management of water supply services. Therefore the first test for the *Reynolds* privilege to apply had been fulfilled. (paras 30-35)

(2) The second part of the test for the *Reynolds* privilege, which was the test of responsible journalism had been misapplied by the Court of Appeal. According to the Court of Appeal, a defendant relying on the *Reynolds* privilege defence was absolved from proving that he took responsible and fair steps to gather, verify and publish the information, by simply claiming that he had an honest belief in the truth of the statements he made. This was plainly wrong. Based on the evidence, it was clear that the defendant had omitted to publish information, which he was in possession of, that would have shown that the non-replacement of water pipes and mains and the cash flow constraints were not due to the plaintiff's own fault. The Court of Appeal had failed to consider that the defendant's knowledge of the plaintiff's true position and failure to disclose these facts would suggest that his conduct was unreasonable and would go against the concept of responsible journalism. Based on the evidence, it was clear that the defendant had failed the responsible journalism test in failing to take responsible and fair steps to gather,

verify and publish the impugned words. The Court of Appeal by overlooking this point had erred in finding that the defendant had succeeded on the *Reynolds* privilege defence of qualified privilege. (paras 36, 37, 39 & 42-44)

(3) As a general rule, the defence of justification was a complete defence to a defamation action and the burden was on the defendant to show that the defamatory imputations were substantially true. In the present case, the defendant had not pleaded justification as a defence but relied on the *Lucas Box* meaning, that is to say, the plea of justification by proving his own reasonable meaning to the impugned words. The sting of the impugned words as pleaded by the defendant was that there were reasonable grounds for suggesting that the plaintiff was facing financial difficulties and as such, it should return the water management rights to the State Government. In its judgment, the Court of Appeal had held that the defendant had properly pleaded the *Lucas Box* meaning and the impugned words were capable of bearing the reasonable meaning ascribed by the defendant. This finding was clearly justified and correct based on the evidence led before the High Court. As such, the finding of the Court of Appeal on this issue was not perverse in any way, warranting appellate intervention. Thus, the defendant had succeeded in the defence of justification. (paras 45-50, 53, 54, 57, 58, 59 & 61)

Bahasa Malaysia *Translation Of Headnotes*

Syarikat Bekalan Air Selangor Sdn Bhd ('plaintif') adalah pembekal dan pengedar tunggal air di Selangor dan Wilayah Persekutuan Kuala Lumpur manakala responden ('defendan') merupakan seorang Ahli Parlimen dan juga anggota Panel Semakan Air Kerajaan Negeri Selangor. Plaintif mendakwa bahawa reputasi perniagaan dan kredit komersialnya telah terjejas berikutan kata-kata yang disebut oleh defendan di sebuah forum ('kata-kata yang dipersoalkan') yang telah diterbitkan dalam satu artikel di Nanyang Siang Pau. Lantaran itu, plaintif memulakan prosiding undang-undang bagi fitnah terhadap defendan. Adalah kes plaintif bahawa artikel tersebut mempunyai maksud semulajadi dan biasa dan melalui innuendo bersifat libel. Ia membawa maksud bahawa plaintif tidak mempunyai dana yang mencukupi untuk membayar hutangnya, tidak cekap dalam mengendalikan operasi perniagaan seperti menggantikan paip air dan bahawa plaintif telah membuat tuntutan yang tidak wajar untuk menaikkan tarif air bagi kepentingan sendiri. Defendan tidak mempertikaikan bahawa dia menyebut kata-kata yang dipersoalkan tersebut tetapi memplidkan bahawa kata-kata tersebut tidak berunsur fitnah terhadap plaintif. Dalam pembelaannya, defendan menggunakan pembelaan perlindungan bersyarat terutamanya perlindungan *Reynolds* dan pembelaan justifikasi. Hakim Mahkamah Tinggi mendapati bahawa kata-kata yang dipersoalkan tersebut adalah bersifat libel terhadap plaintif dan mengawardkan jumlah RM200,000 sebagai ganti rugi am dengan

faedah dan kos kepada plaintif. Terkilan, defendan merayu kepada Mahkamah Rayuan. Mahkamah Rayuan telah membenarkan rayuan defendan dan mendapati bahawa kata-kata yang dipersoalkan tersebut bersifat fitnah hanya setakat menyebut bahawa plaintif mempunyai dana yang tidak mencukupi untuk membayar hutangnya dan tidak cekap dalam menguruskan operasi perniagaan kerana kegagalannya membayar hutang. Mahkamah Rayuan juga mendapati bahawa defendan berhak untuk berjaya dalam pembelaan perlindungan bersyarat kerana dia telah memenuhi ujian tanggungjawab dan kepentingan seperti yang termaktub dalam kes *Reynolds v. Times Newspapers Ltd* ('kes *Reynolds'*) dan bahawa defendan telah membuktikan pembelaan justifikasinya. Tidak berpuas hati, plaintif telah memohon untuk dan memperoleh kebenaran bagi meneruskan rayuan ini terhadap keputusan Mahkamah Rayuan yang berkaitan dengan lima persoalan undang-undang. Persoalan undang-undang tersebut berkait terutamanya dengan bagaimana dan bila defendan boleh bergantung kepada perlindungan *Reynolds* dan pembelaan justifikasi.

Diputuskan (menolak rayuan)
Oleh Azahar Mohamed HMP menyampaikan penghakiman mahkamah:

(1) Walaupun defendan bukan wartawan yang menulis artikel tersebut, pembelaan perlindungan *Reynolds* masih boleh digunakan olehnya. Perlindungan *Reynolds* atau pembelaan kepentingan awam tidak seharusnya menjadi sinonim dengan wartawan atau penerbitan media. Malah, atas alasan kepentingan awam, perlindungan tersebut harus dilanjutkan kepada sesiapa yang menerbitkan atau menyiarkan bahan berkepentingan awam dalam sebarang cara bagi membantu orang awam untuk lebih memahami dan membuat keputusan berpengetahuan mengenai perkara-perkara berkepentingan awam yang mempunyai kesan kepada kehidupan mereka. Pada masa yang sama, hak kebebasan bersuara mengenai perkara-perkara kepentingan awam adalah tidak mutlak tetapi perlu memenuhi ujian kewartawanan bertanggungjawab. Oleh itu, perlindungan *Reynolds* berunsur kepentingan awam dan kewartawanan yang bertanggungjawab. Dalam kes ini, kata-kata yang dipersoalkan yang disebut oleh defendan adalah mengenai perkara berkepentingan awam di mana ia melibatkan operasi dan pengurusan perkhidmatan bekalan air. Oleh itu, ujian pertama bagi perlindungan *Reynolds* untuk digunakan telah dipenuhi.

(2) Bahagian kedua ujian bagi perlindungan *Reynolds* iaitu ujian kewartawanan yang bertanggungjawab telah disalahgunakan oleh Mahkamah Rayuan. Mengikut Mahkamah Rayuan, defendan yang bergantung kepada pembelaan perlindungan *Reynolds* dilepaskan daripada membuktikan yang dia telah mengambil langkah-langkah yang bertanggungjawab dan adil untuk mengumpul, mengesahkan dan

menerbitkan maklumat dengan hanya mendakwa bahawa dia mempunyai kepercayaan yang jujur terhadap kebenaran mengenai kenyataan dibuatnya. Ini adalah jelas salah. Mengikut keterangan, adalah jelas bahawa defendan telah gagal menerbitkan maklumat, yang dimilikinya, yang akan menunjukkan bahawa ketidakgantian paip air dan sesalur dan kekangan aliran tunai bukan disebabkan oleh kesalahan plaintif sendiri. Mahkamah Rayuan telah gagal mengambil kira pengetahuan defendan mengenai kedudukan sebenar plaintif serta kegagalan untuk mendedahkan fakta-fakta yang menunjukkan bahawa perbuatan dia adalah tidak munasabah dan bertentangan dengan konsep kewartawanan yang bertanggungjawab. Berdasarkan keterangan adalah jelas bahawa defendan telah gagal ujian kewartawanan yang bertanggungjawab apabila gagal mengambil langkah-langkah bertanggungjawab dan adil dalam mengumpul, mengesahkan dan menerbitkan kata-kata yang dipersoalkan tersebut. Mahkamah Rayuan telah tersalah pandang perkara ini dan seterusnya terkhilaf dalam dapatannya bahawa defendan telah berjaya atas pembelaan perlindungan bersyarat *Reynolds.*

(3) Sebagai peraturan umum pembelaan justifikasi adalah suatu pembelaan lengkap bagi tindakan fitnah dan beban terletak pada defendan untuk menunjukkan bahawa tuduhan fitnah sebahagian besarnya benar. Dalam kes ini, defendan tidak memplidkan justifikasi sebagai satu pembelaan tetapi bergantung kepada maksud *Lucas Box*, iaitu, rayuan justifikasi dengan membuktikan makna munasabahnya sendiri terhadap kata-kata yang dipersoalkan tersebut. Sengatan kata-kata yang dipersoalkan seperti yang diplidkan oleh defendan adalah bahawa terdapat alasan munasabah yang mencadangkan bahawa plaintif sedang menghadapi masalah kewangan dan oleh itu, ia perlu mengembalikan hak-hak pengurusan air kepada Kerajaan Negeri. Dalam penghakimannya, Mahkamah Rayuan memutuskan bahawa defendan telah dengan betul memplidkan pengertian *Lucas Box* dan kata-kata yang dipersoalkan tersebut mampu membawa maksud yang munasabah dianggap oleh defendan. Dapatan ini dengan jelasnya wajar dan betul berdasarkan keterangan yang dikemukakan di Mahkamah Tinggi. Maka, dapatan Mahkamah Rayuan mengenai isu ini adalah tidak bertentangan dalam apa-apa cara yang mewajarkan campur tangan rayuan. Oleh itu, defendan telah berjaya dalam pembelaan justifikasinya.

Case(s) referred to:

Charman v. Orion Publishing Group Ltd [2008] 1 All ER 750 ***(refd)***
Chase v. Newsgroup Newspapers Ltd [2002] EWCA Civ 1772 ***(refd)***
Cheah Cheng Hoc & Ors v. Liew Yew Tiam & Ors (No 2) [2000] 5 CLJ 475 HC ***(refd)***
Grant v. Torstar Corp 2009 SCC 61 ***(refd)***
Hasnul Abdul Hadi v. Bulat Mohammed & Anor [1977] 1 LNS 33 HC ***(refd)***
Jameel And Another v. Wall Street Journal Europe [2007] 1 AC 359 ***(refd)***

Kearns v. General Council of the Bar [2003] 2 All ER 534 ***(refd)***
Khalid Yusoff v. Pertubuhan Berita Nasional Malaysia (Bernama) & Ors [2014] 8 CLJ 337 HC ***(refd)***
Lucas-Box v. Associated Newspapers Group Plc & Ors [1986] 1 All ER 177 ***(refd)***
McDonald's Corp and Anor v Steel and Anor [1995] 3 All ER 615 ***(refd)***
Mirzan Mahathir v. Star Papyrus Sdn Bhd [2000] 5 CLJ 507 HC ***(refd)***
Moore v. News of the World Ltd [1972] 1 All ER 915 ***(refd)***
Polly Peck (Holdings) v. Trelford [1986] 2 All ER 84 ***(refd)***
Raphael Pura v. Insas Bhd And Anor [2003] 1 CLJ 61 ***(refd)***
Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 (HL) ***(refd)***
Seaga v. Harper [2008] 1 All ER 965 ***(refd)***
Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd [2010] 7 CLJ 885 HC ***(refd)***
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Viscount De Lisle v. Times Newspapers (COA) [1987] 3 All ER 500 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Defamation Act 1957, s. 8
Federal Constitution, art. 10

Other source(s) referred to:
Gatley on Libel & Slander, 11th edn, para 14.3

For the appellant - Gopal Sreenevasan (Fadzilah Pilus & Tan Ch'eng Leong with him); M/s Sreenevasan Young
For the respondent - Gobind Singh Deo (Alliff Benjamin, Mohd Haijan Omar, Joanne Chua Tsu Fae & Malini Subramaniam with him); M/s Thomas Philip

[Editor's note: For the Court of Appeal judgment, please see Tony Pua Kiam Wee lwn. Syarikat Bekalan Air Selangor Sdn Bhd [2013] 1 LNS 1433 (affirmed).]

Reported by Vani Krishnan

JUDGMENT

Azahar Mohamed FCJ:

Introduction

[1] This is an appeal from the judgment of the Court of Appeal that reversed the judgment of the High Court. The appeal arises from an action brought in the High Court by the appellant, Syarikat Bekalan Air Selangor Sdn Bhd (the plaintiff in the High Court). The appellant sued the respondent, Tony Pua Kiam Wee (the defendant in the High Court) for defamation in relation to words that he uttered at a forum that were later published in an article in two local newspapers.

[2] We will describe the parties in this judgment as they appear in the High Court, namely the appellant as the plaintiff and the respondent as the defendant.

[3] The High Court had on 6 June 2012, after full trial, allowed the plaintiff's claim and ordered the defendant to pay RM200,000 in general damages. The defendant appealed to the Court of Appeal and on 27 March 2013, the Court of Appeal set aside the High Court orders. Aggrieved by the judgment of the Court of Appeal, the plaintiff applied for leave to appeal to the Federal Court under s. 96(a) of the Courts of Judicature Act 1964 and on 18 March 2014, this court granted leave to appeal to the plaintiff on five questions of law.

Background Facts

[4] The background facts are very straightforward. The plaintiff is a company incorporated to undertake the privatisation of water supply services in the State of Selangor and the Federal Territories of Kuala Lumpur and Putrajaya ("the concession area"). The plaintiff is the sole supplier and distributor of water in the concession area.

[5] The defendant is a member of the Democratic Action Party, holding the post of National Publicity Secretary. The defendant was elected to the Malaysian Parliament by the constituency of Petaling Jaya Utara in 2008. The defendant is a member of the Malaysian Parliamentary Public Accounts Committee. The defendant is also a member of the Selangor State Government Water Review Panel appointed by the Selangor State Government. He is also an active contributor to public debate on public interest issues in Malaysia including the issue of water supply rights.

[6] On 28 January 2011, the plaintiff commenced legal proceedings against the defendant for defamation in relation to words uttered by the defendant at a forum on 14 November 2010 ("the impugned words"), which were subsequently published in an article in Nanyang Siang Pau, the Metro edition on 16 November 2010. The agreed English translation of the article, as reproduced in the judgment of the High Court, with the impugned words appearing in bold reads as follows:

> **DAP's publicity secretary Tony Pua said, Syarikat Bekalan Air Selangor (SYABAS) is urged to return the management rights of water supply to the Selangor government**, the Selangor state government will aggressively launch a signature campaign to return water rights to the people of Selangor this month, after collecting 100,000 signatures they will be submitted to the Yang Di Pertuan Agong on 5th December 2010.
>
> **He said, after the breakdown of negotiations for the Selangor Government's plan to take over the 4 water concessionaires, (the Selangor Government) launched the signature campaign to return water rights to the people, to ensure the water tariff in the state of Selangor will not be** increased by 37%.
>
> The provision of water services in Selangor is managed by 4 companies, some companies experienced cash flow problems, they do not have enough cash flow to repay their debts, they (*sic*) requested that a restructuring be done, the 4 companies merged into 1.

He said, during the negotiation between the Selangor state government and the Federal government on the restructuring, the state government requested to take over the management rights as people's interest is its priority, but the Federal government wants Syabas to manage.

He said, a privatised company should provide the service with the highest quality at the lowest price, (it) cannot keep asking for tariff hikes. He said, they (the state government) cannot accept a hike of 37% in water tariff, the company responsible for water services thinks the profit margin is too low, but even though the state government offered to buy, they are not willing to sell, including the proposals to buy different water concessionaires for close to RM9.3 billion and RM11 billion, but no one is willing to budge.

He said, if the water concessionaire has insufficient funds to repay its loan, it should return the water rights to the state government, if the water concessionaire is unable of replace water pipes, it should give up or exit the water business, and not ask to borrow money from the Federal government.

He said, according to last year's figure, Syabas borrowed RM320 million from the Federal government but the interest of RM250 million is borne by the people.

[7] The plaintiff contended that it had been disparaged in its business reputation, goodwill and commercial credit by reason of the publication of the impugned words. The plaintiff also contended that the impugned words in their natural and ordinary meaning and by way of innuendo, were libellous of it and meant or were understood to mean that the plaintiff was incompetent in managing water supply rights as it was unable to pay its debts or to replace water pipes; and given that it was not able to pay its debts, the plaintiff was making improper claims to raise water tariffs, which was only for its own benefit. The plaintiff averred that the defendant was motivated by malice and could not seek refuge in the defences of justification and qualified privilege. It was the plaintiff's case that the defendant was motivated by political gain in uttering the impugned words and was reckless as to whether or not they were true. It was also the plaintiff's case that the defendant had no honest belief in what he said.

[8] The defendant did not dispute that he uttered the impugned words. However, the defendant pleaded that the impugned words were not defamatory of the plaintiff. Alternatively, the defendant raised some important contentions. In his pleaded defence, the defendant raised, amongst others, the defence of qualified privilege, particularly *Reynolds* privilege and the defence of justification. The defendant also brought a counterclaim for what he alleged to be an abuse of process of the court and "unnecessary harassment" for the reason that there was no basis for the plaintiff to file the action in the first place. The defendant claimed damages for that.

A **The Findings Of The High Court**

[9] As indicated earlier, the High Court, after a trial that took four days, allowed the plaintiff's claim and found the defendant liable for the sum of RM200,000 as general damages, with interest and costs. The defendant's counterclaim was dismissed. The High Court held that the plaintiff had
B successfully proven the three basic elements required to maintain its action in defamation, namely that the impugned words uttered by the defendant bore defamatory imputations; the impugned words referred to the plaintiff; and the impugned words were published to third parties. The High Court found that the impugned words carried the following meanings:

C
(a) The Plaintiff has insufficient funds to pay its debts;

(b) It is incompetent in handling its business operations if it cannot pay its debts;

(c) It is incompetent if it is not able to replace water pipes;

D
(d) It is incompetent and should therefore exit the water business; and

(e) Unless the water rights are returned to the State Government, there will be a 37% increase in water tariffs.

[10] In coming to its decision, the High Court held that before the
E defendant could rely on the defence of qualified privilege (*Reynolds* privilege), the defendant had to satisfy the two requirements as set out in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 (HL), in that:

(i) the publication concerned a matter of public interest; and

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(ii) responsible and fair steps had been taken to gather, verify and publish the information.

[11] The High Court went on to find that the defendant had succeeded in the first limb but had failed in respect of the second limb, essentially because he had known that the non-replacement of water pipes and mains and the
G cash flow problems faced by the plaintiff were the result of the freeze of capital expenditure works and the refusal of the Selangor State Government to agree to a proposed tariff hike; but the defendant nevertheless failed to convey the true reasons for the plaintiff's inability to pay its debts and replace the water pipes.

H **[12]** In relation to the defence of justification, the High Court found that the defendant had not pleaded the defence of justification in relation to the impugned words; and in any event, defendant had failed to prove that it was the plaintiff's incompetence or mismanagement which had led it to be unable to pay its debts or to replace the water pipes.

I

Findings of the Court of Appeal

[13] In allowing the defendant's appeal, the Court of Appeal found that the impugned words were defamatory only to the extent of the following defamatory imputations:

(i) The Plaintiff has insufficient funds to pay its debts; and

(ii) The Plaintiff is incompetent in handling its business operations since it cannot pay its debts.

[14] In relation to qualified privilege, the Court of Appeal held that the defendant was entitled to succeed on the defence of qualified privilege (*Reynolds* privilege) as he had satisfied the duty and interest tests as propounded in *Reynolds v. Times Newspapers Ltd (supra).*

[15] On the defendant's plea of justification, the Court of Appeal found that the defendant had pleaded his own reasonable meaning of the impugned words and had sought to justify the meanings based on facts pleaded in his defence. The Court of Appeal held that this form of justification was permitted in law as established in *Lucas-Box v. Associated Newspapers Group Plc & Ors* [1986] 1 All ER 177. The admissions by the plaintiff's Chief Executive Officer (PW4) during cross-examination supported the meanings to the impugned words ascribed by the defendant in relation to the plaintiff's financial status. For that reason, the Court of Appeal found that the defendant had proven his defence of justification. The Court of Appeal added that in respect of the defamatory imputations, the contents of the report were sufficiently true to allow the defence of justification to succeed pursuant to s. 8 of the Defamation Act 1957.

The Questions Of Law On Appeal To The Federal Court

[16] As mentioned earlier, this court granted leave to the plaintiff to appeal against the decision of the Court of Appeal on the following five questions of law:

(i) whether the defence of qualified privilege as set out in the English House of Lords case of *Reynolds v. Times Newspapers Ltd (supra)* (*Reynolds* privilege) is available to an individual who is not a journalist?

(Question 1)

(ii) whether in relying on the defence of *Reynolds* privilege, the defendant has to show that responsible and fair steps were taken to gather, verify and publish the information; or whether it is sufficient to merely have an honest belief that the statement(s) were true, even if the statement(s) were in fact untrue?

(Question 2)

(iii) in the event that *Reynolds* privilege applies, would the plaintiff have to prove malice to defeat the claim of such privilege?

(Question 3)

(iv) whether there exists a defence of justification based on "reasonable grounds for suggesting" as opposed to "reasonable grounds for suspicion"? If so, what are the elements required to establish such a defence?

(Question 4)

(v) whether it is a defence for a defendant to rely on a plea of justification of a lesser defamatory meaning in relation to the conduct or status of the plaintiff, even though the status or conduct so justified was distinct from the sting of the defamatory article?

(Question 5)

[17] Questions 1, 2, and 3 deal with the defence of *Reynolds* privilege. They concern the scope of the application and the elements required to be established before such a defence can be successfully relied on or defeated.

[18] Whilst the remaining questions 4 and 5 relate to issues concerning the defence of justification.

[19] It has to be highlighted at this point that both the plaintiff and the defendant did not appeal to this court against the finding of the Court of Appeal that the impugned words uttered by the defendant were libellous only to the extent of the defamatory imputations that the plaintiff had insufficient funds to pay its debt and the plaintiff was incompetent in handling its business operations since it could not pay its debt. We will therefore confine our consideration to the defences raised by the defendant.

[20] We will deal first with the defence of *Reynolds* privilege.

The *Reynolds* Privilege Defence

[21] In his pleaded defence, the defendant contended that the impugned words was on a matter of undisputed public interest as it concerned the subject matter of water rights; the consumers and the public had a right to know the facts relating this basic right. Moreover, the defendant contended that as a Member of Parliament and a member of the Water Review Panel, he had a legal and social duty or interest to publish the article and the public had a corresponding interest in receiving the same. It was against this background that we should view the contention of the defendant that the publication of the impugned words was an occasion of qualified privilege as enumerated in *Reynolds v. Times Newspapers Ltd (supra).*

[22] As a matter of broad general principle, a privileged occasion is one on which the privileged person is entitled or permitted to do or utter something which no one who is not within the privilege is entitled or permitted to do on that occasion, without incurring the liability for defamation. The defence of qualified privilege is grounded on public policy and convenience that the law will, on occasion, allow an individual to make statements which are defamatory and untrue of another without incurring legal liability (see for example *Hasnul Abdul Hadi v. Bulat Mohammed & Anor* [1977] 1 LNS 33; [1978] 1 MLJ 75).

[23] This then brings us into sharp focus the very important English House of Lords case of *Reynolds v. Times Newspapers Ltd (supra)* concerning qualified privilege for publication of defamatory statements in the public interest. This much quoted case provides a good starting point. It is worth to set out the essential background facts. In that case, Mr Reynolds had been the Prime Minister of Ireland, until a political crisis in 1994. He began proceedings for defamation against the Times, the publisher of an article contained in the British mainland edition of a national newspaper. The publication related to an article to the effect that Mr Reynolds had misled the Irish Parliament. Mr Reynolds claimed that the words complained of bore the meaning that he had deliberately and dishonestly misled the Parliament and his cabinet colleagues. The Times pleaded, *inter alia*, the defence of qualified privilege at common law. At the trial the jury returned a verdict in Mr Reynolds's favour and he was awarded damages. The Court of Appeal set aside the jury's verdict and ordered a retrial on the ground of misdirection to the jury. The court also ruled that the publication was not covered by qualified privilege. The Times appealed, contending that the courts should recognise a generic qualified privilege encompassing the publication by a newspaper of political matters affecting the people of the United Kingdom.

[24] The House of Lords rejected this contention and held that the common law should not develop a new subject matter category of qualified privilege whereby the publication of all political information would attract qualified privilege whatever the circumstances, since that would fail to provide adequate protection for reputation. It was held that it would be unsound in principle to distinguish political information from other matters of public concern. The House of Lords agreed that the traditional ambit of qualified privilege should be extended somewhat and that it was available in respect of political information upon application of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had had an interest in receiving it. The decision marked a decisive departure from the traditional pro-reputation orientation of defamation law in England and was quickly recognised as a "media-friendly development" (see *Grant v. Torstar Corp* 2009 SCC 61). As a result of *Reynolds v. Times Newspapers Ltd (supra)* there is now a much more

extensive protection for publications to the world at large where the matter is of sufficient public concern. This is known as *Reynolds* privilege. Lord Hoffman in *Jameel And Another v. Wall Street Journal Europe* [2007] 1 AC 359, on the other hand said it might be more appropriately be called *Reynolds* public interest defence.

[25] On the implication and significance of *Reynolds v. Times Newspapers Ltd (supra)*, specifically on the question of "responsible journalism", it is useful we refer to the judgment of Lord Carswell in the Privy Council case of *Seaga v. Harper* [2008] 1 All ER 965:

> The germ of the idea of a privilege for reports to a wide range of readers or listeners where the circumstance warrant a finding of sufficient general public interest may, however, be seen in *Blackshaw v. Lord*, a decision which merits more attention than it has hitherto received. To recognise such statements should be made, notwithstanding the risk that they may be defamatory of the subjects of the statements. Nevertheless, although attempts were made to move the law in this direction, it could not be said until the decision of the House of Lords in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 that a defence on these lines was available to those who published defamatory statements to the world at large ...
>
> ... Lord Nicholls of Birkenhead, who gave the main speech, considered the essential factors of freedom of expression, the importance of the role of the media in the expression and communication of information and comment on political matters, and the reputation of individuals as an integral and important part of their dignity. He concluded that the necessary balance between these factors could be achieved, while liberating the law to some extent from the traditional duty-interest concept of qualified privilege. He considered that the established common law approach remained essentially sound. What he proposed, with which the other members of the appellate committee agreed, was a degree of elasticity, adapting the common law test to afford some protection to what he described as 'responsible journalism'.
>
> The court is to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public.

[26] A feature of the present defamation action brought by the plaintiff was that it was premised on an article, which the defendant did not personally pen or publish. Instead, the article contained a republication of the impugned words uttered by the defendant, at a forum where reporters were present. It is pertinent to note that the defendant was not a journalist when he uttered the impugned words.

[27] Here arises an important question that we have to consider: whether the *Reynolds* privilege defence is available to an individual who is not a journalist or is it available only to the press and broadcasting media. Learned counsel for the plaintiff submitted that if one looked at the principle behind

the application of *Reynolds* privilege, that was to say, news being perishable and urgent and indeed the guidelines for responsible journalism, the better view was that taken by the English Court of Appeal in *Kearns v. General Council of the Bar* [2003] 2 All ER 534 in that it should be limited only to journalists or media publications.

[28] In *Kearns v. General Council of the Bar (supra)*, the Court of Appeal held as follows:

> It is clearly established that in cases of publication to the world at large 'the steps taken to verify the information' (item 4 in Lord Nicholls of Birkenhead's non-exclusive list of matters to be taken into account (see *Reynolds v. Times Newspapers Ltd* [1999] 4 All ER 609 at 626, [2001] 2 AC 127 at 205)) together with other such circumstances concerning the quality and reliability of the facts asserted, may be crucial in deciding whether qualified privilege attaches. *Reynolds*' case, however, applies only to media publications ...
>
> Were this to have been a media publication and *Reynolds v. Times Newspapers Ltd [1999] 4 All ER 609*, [2001] 2 AC 127 therefore to apply, there could be no question of qualified privilege attaching. And the Reynolds approach, one reflects, attaches on occasion to publications circulating no more widely and hardly more generally than in the present case-consider, for example, the Saudi Arabian newspaper with a circulation of some 1,500 readers in *Al-Fagih v. HH Saudi Research Marketing (UK) Ltd* [2001] EWCA Civ 1634, [2002] EMLR 215. The law with regard to non-media publications, however, is different.

[29] However, the courts have since then taken a somewhat different approach. In *Jameel And Another v. Wall Street Journal Europe (supra)* Lord Hoffman held thus:

> Lord Nicholls was speaking in the context of a publication in a newspaper but the defence is of course available to anyone who publishes material of public interest in any medium. The question in each case is whether the Defendant behaved fairly and responsibly in gathering and publishing the information. But I shall for convenience continue to describe this as 'responsible journalism'.

[30] The next case of particular importance is the case of *Seaga v. Harper (supra)*, where the Privy Council rejected the view of *Kearns v. General Council of the Bar (supra)*:

> The second disputed matter, which is germane to the present appeal, is whether the *Reynolds* defence is available only to the press and broadcasting media or whether it is of wider ambit. In *Kearns v. General Council of the Bar* 120031 EWCA Civ 331, (2003) 2 All ER 534 the Court of Appeal expressed the view that it was confined to media publications. That was not, however, necessary to the decision and their Lordships are unable to accept that it is correct in principle. They can see no valid reason

A why it should not extend to publications made by any person who publishes material of public interest in any medium, so long as the conditions framed by Lord Nicholls as being applicable to 'responsible journalism' are satisfied.

[31] In *Charman v. Orion Publishing Group Ltd* [2008] 1 All ER 750, the B English Court of Appeal came to a similar conclusion:

'The urgency of the matter. News is often a perishable commodity.' This factor does not arise in this case as the judge correctly held. I see no reason at all for confining responsible journalism to newspapers and magazines. It must be extended to the authors and publishers of books. C Mr. Tomlinson did not attempt to suggest otherwise. As Lord Hoffmann said in *Jameel*'s case [2006] 4 All ER 1279 at [54] the *Reynolds* defence is available 'to anyone who publishes material of public interest in any medium', the emphasis being added by me. I agree, however, with Mr. Tomlinson's submission that because the authors and publishers are not under the same pressure of time before the presses begin to roll, D greater care will be expected of them to ensure they act properly.

[32] Nearer home, we were informed that the only reported decision on this issue was the High Court decision of *Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd* [2010] 7 CLJ 885; [2010] 9 MLJ 320, which cited with approval the judgment of *Jameel And Another v. Wall Street Journal Europe* E *(supra)* to the effect that the defence is available to anyone who publishes material of public interest in any medium.

[33] In our view, the public interest defence should by no means synonymous with journalists or media publications. On the ground of public interest, there is a sufficient basis it should be in the same way extended to F anyone who publishes or discloses material of public interest in any medium to assist the public better comprehend and make an informed decision on matters of public interest that affects their lives. To safeguard the extension of this privilege is not abused, as a necessary balance, it is the duty of the court to robustly ensure that anyone who is accorded with the privilege meet G the test of responsible journalism, about which more will be said later in this judgment. This, in our view, underpins the significance of protecting the right of freedom of expression on public interest matter and at the same time providing adequate protection for reputation. Freedom of expression is not absolute. Indeed, freedom of expression and the responsibilities that comes H with it is enshrined in art. 10 of the Federal Constitution. We should like to emphasise here that the *Reynolds* privilege defence places a considerable role in the hands of judges to deliberate fairly and come to a just decision with utmost care whether the impugned publication amount to an occasion of privilege.

I

[34] The *Reynolds* privilege defence is predicated on public interest and "responsible journalism". In the context of the present case, the *Reynolds* privilege defence required the defendant first, to establish that the impugned words were uttered on a matter of public interest and the public had a corresponding interest in receiving the same. Once that was established, the court must consider whether the defendant acted reasonably in publishing the impugned words. This second test has been described as the test of "responsible journalism" (see *Reynolds v. Times Newspapers Ltd (supra)* and *Jameel And Another v. Wall Street Journal Europe Sprl (supra)*. Although the test refers to "journalism", it is merely a convenient description because as we have decided earlier the *Reynolds* privilege defence is in no way limited to journalistic publications. If the defendant passed the test of responsible journalism, the issue would be determined in his favour. Lord Nicholls in *Reynolds v. Times Newspapers Ltd (supra)* sets out a number of factors to be taken into account in determining the issue of responsible journalism. These factors, which are not exhaustive, are, *inter alia*, as follows:

(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

(2) The nature of the information, and the extent to which the subject matter is a matter of public concern.

(3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

(4) The steps taken to verify the information.

(5) The status of the information. The allegation may have already been the subject of an investigation, which commands respect.

(6) The urgency of the matter. News is often a perishable commodity.

(7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

(8) Whether the article contained the gist of the plaintiff's side of the story.

(9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

(10) The circumstances of the publication, including the timing.

[35] In the present case, the impugned words uttered by the defendant was on a matter of public interest. Undeniably, the impugned words concerned the operation and management of water supply services. In fact, this was an indisputable fact. Therefore, the first test for the *Reynolds* privilege defence to apply had been fulfilled.

[36] The first test did not raise any serious difficulty. When it came to the second test, though, the defendant ran into difficulties. The question that arises is this: whether the requisite of "responsible journalism" had been fulfilled. This is the main area of concern. In the context of the present case, the key part of the judgment of the Court of Appeal is as follows:

> In our judgment, the appellant is entitled to succeed in this defence even if the statements are untrue and/or the report failed to include the facts enumerated by the Learned Trial Judge. The important consideration is not the truth of the statements, but whether the appellant honestly believed in the truth of impugned words. In this respect, whether he genuinely believed in the truth of the impugned words, would, in turn, depend on the source for the statements issued by the appellant. This proposition of law is best illustrated in the judgment of Lord Bingham of Comhill CJ in the case of *Reynolds v Times Newspaper Ltd (supra)* in the Court of Appeal. His Lordship in this judgment postulated the need for a defendant to satisfy the following three tests to succeed in the defence of qualified privilege. The first was described as the 'duty test', the second as the 'interest test' and the third as the 'circumstantial test'. We propose, to only refer to the 'circumstantial test' since the Learned Trial Judge was satisfied that the appellant met the other two tests. His Lordship had this to say about the 'circumstantial test':
>
> > It would, however, in our judgment, run counter to English authority and do nothing to promote the common convenience of our society to discard the circumstantial test. Assuming in each case that a statement is defamatory and factually false although honestly believed to be true, it is one thing to publish a statement taken from a government press release, or the report of a public company chairman, or the speech of a university vice-chancellor, and quite another to publish the statement of a political opponent, or a business competitor or a disgruntled ex-employee; it is one thing to publish a statement which the person defamed has been given the opportunity to rebut, and quite another to publish a statement without any recourse to the person defamed where such recourse was possible; it is one thing to publish a statement which has been so far as possible checked, and quite another to publish it without such verification as was possible and as the significance of the statement called for. While those who engage in public life must expect and accept that their public conduct will be the subject of close scrutiny and robust criticism, they should not in our view be taken to expect or accept that their conduct should be the subject of false and defamatory statements of fact unless the circumstances of the publication are such as to make it proper, in the public interest, to afford the publisher immunity from liability in the absence of malice. We question whether in practice this is a test very different from the test of reasonableness upheld in Australia ...

> In our judgment, once the duty and interest 'test' are satisfied in the sense that all relevant information is in the public domain, then, the appellant is not obliged to satisfy the further Reynolds requirement (see paragraph 14.3 of Gatley on *Libel and Slander* 11th Edition) ...
>
> ... It must be appreciated that, in law, the occasion may be privileged even if the appellant failed to disclose all the relevant facts.

[37] The passage above, in our view, raises some serious problems. The Court of Appeal held that for the defendant to successfully rely on *Reynolds* privilege defence, it was sufficient to merely have an honest belief that the impugned words were true, even if the words were in fact untrue; once all relevant information was in the public domain, then, the defendant was not obliged to satisfy the further *Reynolds* privilege requirements. We note that the Court of Appeal made no reference to the test of "responsible journalism". It would appear that the Court of Appeal completely overlooked this crucial point.

[38] In this regard, learned counsel for the defendant submitted that the Court of Appeal had applied the correct test in adopting the circumstantial test, which looked at the circumstances of the publication to ensure that such publication was proper. He argued that the circumstantial test and the responsible journalism test was ultimately the same, as they look into similar if not the same factors in order to determine whether the publication of the impugned words is warranted. As such, he argued, the circumstantial test applied by the Court of Appeal was the correct test as it sufficiently took into account the defendant's conduct and the nature and tone of the impugned words in determining the *Reynolds* privilege defence.

[39] In our judgment, the submissions of learned counsel for the defendant pose at least two problems. In the first place, the responsible journalism guidelines have consistently been upheld since *Reynolds v. Times Newspapers Ltd (supra)* was decided by the House of Lords. As we see it, the "circumstantial test" and the "reasonable journalism test" was not the same. In fact, as pointed out by Lord Hope in *Reynolds v. Times Newspapers Ltd (supra)* "the circumstantial test is confusing and it should not be adopted". The guidelines as advocated by Lord Nicholls set out a number of important relevant matters to be taken into consideration in deciding whether the publication of impugned statements was privileged for the reason of its significance to the public at large. The list was not all-inclusive, but was explanatory only and the weight to be given to those and other pertinent aspects would vary from case to case. Secondly, according to the Court of Appeal, a defendant relying on the *Reynolds* privilege defence was absolved from proving that he took responsible and fair steps to gather, verify and publish the information, by simply claiming that he had an honest belief in the truth of the statements he made. With respect, this is plainly wrong. We

A agree with the submissions of learned counsel for the plaintiff that these new propositions by the Court of Appeal are diametrically opposed to the guidelines on responsible journalism as set out in *Reynolds v. Times Newspapers Ltd (supra).* In our view the guidelines on responsible journalism as espoused in *Reynolds v. Times Newspapers Ltd (supra)* is important because there is now
B a much more extensive protection for publications to the public at large where the matter is of sufficient public concern. For that reason, as a counter-balance, publishers must meet the test of responsible journalism to ensure that the privilege is not abused. Rights and responsibilities must go hand in hand. Freedom of speech is not an end in itself; it must be exercised
C with a sense of responsibility. This point has already been made earlier but ought to be restated.

[40] As noted earlier, the Court of Appeal held that "once all relevant information is in the public domain, then, the defendant is not obliged to satisfy the further *Reynolds* requirements". Emphasizing this point, to support
D this proposition of law, the Court of Appeal in its judgment cited para. 14.3 of *Gatley on Libel & Slander,* 11th edn. On this, it is instructive to refer to said paragraph, which reads as follows:

> If the requisite duty and interest can be found in a public communication the defendant is not obliged to satisfy the further *Reynolds* requirements,
E though in determining whether qualified privilege applies questions of reasonableness of conduct may be relevant and this may require a court to take account of factors such as whether any steps have been taken to verify the information being communicated.

[41] As submitted by learned counsel for the plaintiff, a closer reading of
F the above passage did not support the Court of Appeal proposition of law. Clearly, the opinion in *Gatley* went further to say that parts of the *Reynolds* privilege test dealing with issues of reasonable of conduct (for example, whether steps have been taken to verify the information) were relevant. He further argued that a far reaching implication of the Court of Appeal's
G proposition was that it would allow defendants to publish untrue defamatory statements, simply because the state of affairs had already been published before in the public domain. We see much force in this argument. We agree with the submissions of learned counsel for the plaintiff that this cannot be right as such a proposition runs counter to the very concept of fair and responsible journalism.

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[42] There is one aspect of the decision of the High Court that deserves our attention. It is this: the High Court found that the defendant had known that the non-replacement of water pipes and mains and the cash flow problems faced by the plaintiff were the result of the freeze of capital expenditure
I works and the refusal of the Selangor State Government to agree to a proposed tariff hike and not the plaintiff's own fault. The defendant

deliberately withheld this information, which would have explained the plaintiff's position and indeed did nothing to elicit a response from the plaintiff. On the contrary, the Court of Appeal held that the occasion might be privileged even if the defendant failed to disclose all the relevant facts. With respect, in so deciding, the Court of Appeal failed to judiciously appreciate that omitting to disclose the gist of the plaintiff's side of the story would result in an unfair and misleading report and would go against the concept of responsible journalism.

[43] In his submissions, learned counsel for the plaintiff took us through the evidence of the defendant at the trial during cross-examination. The evidence disclosed that the defendant had omitted to publish information, which he was in possession of, which would have shown the plaintiffs side of the story, in that the non-replacement of water pipes and mains and the cash flow constraints were not due to the plaintiff's own fault. We should remind ourselves that in *Reynolds v. Times Newspapers Ltd (supra)*, Lord Nicholls held that omitting the plaintiff's explanation of the version of events would result in an unfair and inaccurate report, which would be misleading:

> A most telling criticism of the article is the failure to mention Mr. Reynolds' own explanation to the Dáil. Mr. Ruddock omitted this from the article because he rejected Mr. Reynolds' version of the events and concluded that Mr. Reynolds had been deliberately misleading. It goes without saying that a journalist is entitled and bound to reach his own conclusions and to express them honestly and fearlessly. He is entitled to disbelieve and refute explanations given. But this cannot be a good reason for omitting, from a hard hitting article making serious allegations against a named individual, all mention of that person's own explanation. Particularly so, when the press offices had told Mr. Ruddock that Mr. Reynolds was not giving interviews but would be saying all he had to say in the Dáil. His statement in the Dáil was his answer to the allegations. An article omitting all reference to this statement could not be a fair and accurate report of proceedings in the Dáil. Such an article would be misleading as a report. This article is not defended as a report, but it was misleading nonetheless. By omitting Mr. Reynolds' explanation English readers were left to suppose that, so far, Mr. Reynolds had offered no explanation. Further, it is elementary fairness that, in the normal course, a serious charge should be accompanied by the gist of any explanation already given. An article, which fails to do so faces an uphill task in claiming privilege if the allegation proves to be false and the unreported explanation proves to be true.

[44] In our judgment, the Court of Appeal had failed to consider that the defendant's knowledge of the plaintiff's true position and failure to disclose these facts would suggest that his conduct was unreasonable and would go against the concept of responsible journalism. In our judgment, the defendant had failed the responsible journalism test in failing to take responsible and

A fair steps to gather, verify and publish the impugned words. The Court of Appeal overlooked this point. Accordingly, we find that the Court of Appeal had erred in finding that the defendant had succeeded on the *Reynolds* privilege defence of qualified privilege as set out in *Reynolds v. Times Newspaper Ltd (supra).*

B **Justification**

[45] This area of law is well settled. As a matter of general rule, the defence of justification is a complete defence to a defamation action (see *Hasnul Abdul Hadi v. Bulat Mohamed & Anor* [1977] 1 LNS 33; [1978] 1 MLJ 75 and *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS C 304; [1996] 1 MLJ 393). The burden is on the defendant to show that the defamatory imputations are substantially true.

[46] An important point to note is that the defendant did not plead justification to the meanings pleaded by the plaintiff. The part of his defence D that deals with justification is in para. 7 as follows:

> In the alternative, the Defendant contends that insofar as the Impugned Words bear the meanings as set out in paragraph 6 above are true in substance and/or fact.

[47] What the defendant had done was to plead justification to what is E known as *Lucas-Box* meaning, that is to say, the plea of justification by proving the defendant's own reasonable meaning to the impugned words as set out in para. 6 of his defence.

[48] Learned counsel for the plaintiff argued that a perusal of para. 6 of the defence showed that in actual fact, the defendant had not even pleaded a F defence of justification of the truth of meanings of the impugned words that he ascribed, but instead pleaded that "there were and are reasonable grounds for suggesting" the meanings. He then cited the case of *Chase v. Newsgroup Newspapers Ltd* [2002] EWCA Civ 1772. Learned counsel submitted that the English Court of Appeal in that case held at para. 45 that there could be three G different categories of meaning for the defence of justification:

> The sting of a libel may be capable of meaning that a claimant has in fact committed some serious act, such as murder. Alternatively, it may be suggested that the words mean that there are reasonable grounds to suspect that he/she has committed such an act. A third possibility is that H they may mean that there are grounds for investigating whether he/she has been responsible for such an act.

[49] Based on the above passage, learned counsel for the plaintiff submitted that a plea of "reasonable grounds for suggesting" did not amount to a valid plea for the defence of justification. He submitted that whilst it was apparent I from *Chase v. Newsgroup Newspapers Ltd (supra)* that the court had recognised

the defence of "reasonable suspicion" as a lower level of defamatory meaning, which may be justified, there was no authority on whether there also existed a defence of justification based on "reasonable grounds to suggest". A

[50] We are not persuaded by this line of arguments. In our judgment, the Court of Appeal rightly held that the defendant had properly pleaded the *Lucas-Box* meaning. This plea originated from the Court of Appeals decision in *Lucas-Box v. Associated Newspapers Group Pic & Ors (supra).* In delivering his judgment, Ackner LJ explained as follows: B

> ... it has become the settled practice for a plaintiff, where the meaning of the words complained of is not clear and explicit, to plead the meanings which he says the words bear. This enables the defendant to know what case he has to meet and to prepare his defence accordingly. Such a practice is, further, of considerable assistance to the court since it thus clearly provides to the trial judge the meanings on which he must rule in deciding whether the words published are capable of being so understood. The general question which has arisen in this case is the reverse of the coin, namely whether a defendant who pleads justification must state the meaning which he seeks to justify. C D

Further down in his judgment, Ackner LJ added as follows:

> However, we would go even further and say that, whatever may have been the practice to date, in future a defendant who is relying on a plea of justification must make it clear to the plaintiff what is the case which he is seeking to set up. The particulars themselves may make this quite clear, but if they are ambiguous then the situation must be made unequivocal. E F

[51] In substance, the *Lucas-Box* plea of justification as decided by the English Court of Appeal is as follows:

(a) If a plaintiff, in its defamation pleadings, gives a natural and ordinary meaning to the impugned words, the defendant may then rely on stating in his defence what he alleged was the natural and ordinary meaning of the words complained of; and G

(b) A defendant in defamation proceedings who wishes to rely on a plea of justification must make clear in the particulars of justification the case which he is seeking to set up and must accordingly state clearly and explicitly the meaning which he seeks to justify. H

[52] We now need to turn our attention, and look more closely to paras. 6 & 7 of the amended defence and counterclaim of the defendant, which read as follows:

> (6) In the alternative, the Impugned Words insofar as they bear a defamatory meaning (which is denied) meant and were understood to mean that as follows and not in the meanings pleaded in paragraphs 12(a) and/or (b) of the Claim or any other meaning: I

6.1 there were and are reasonable grounds for suggesting that:

(a) Management rights of water supply should be returned to the State of Selangor Government;

(b) SYABAS refused to cooperate with the State of Selangor Government to reach an amicable solution with regards to the management rights of water supply in the State of Selangor and the Federal Territories of Kuala Lumpur and Putrajaya;

(c) SYABAS refused to return the water rights to the State of Selangor and/or abandoning or terminating its water supply services;

(d) SYABAS insisted on proceeding with as much as a 37% tariff hike and have initiated legal proceedings against the Selangor State Government in-order to Implement the tariff hike;

(e) The State of Selangor Government would be in a better position to manage the water supply in the State of Selangor and the Federal Territories of Kuala Lumpur and Putrajaya, or at the very least in the State of Selangor.

(7) In the alternative, the Defendant contends that insofar as the Impugned Words bear the meanings as set out in paragraph 6 above are true in substance and/or fact.

[53] We should also note that the defendant sought to justify his own pleaded meaning of the impugned words by relying on paras. 2 until 4 of the amended defence and counterclaim.

[54] In our judgment, a perusal of paras. 6 and 7 above, which have to be read together, shows that the defendant had clearly and expressly pleaded the *Lucas-Box* meaning. The defendant first denied that the impugned words carried any defamatory meaning. He then went on to contend that the meanings set out in para. 6 were true in substance and in fact. This was in accordance with the method of a *Lucas-Box* plea. The defendant proceeded to plead particulars to support the meanings he gave to the impugned words (see *Polly Peck (Holdings) v. Trelford* [1986] 2 All ER 84, *Viscount De Lisle v. Times Newspapers (COA)* [1987] 3 All ER 500, *Chase v. News Group Newspaper Ltd* [2002] EWCA Civ 1772 and *Mirzan Mahathir v. Star Papyrus Sdn Bhd* [2000] 5 CLJ 507; [2000] 6 MLJ 29). In our view, the defendant had pleaded with clarity as to the meaning he attributed to the impugned words, which was different from the meaning understood by the plaintiff. The plaintiff knew what case it had to meet and the meaning which the defendant sought to attribute to the impugned words.

[55] There is one issue that calls for specific attention. As can be seen earlier, learned counsel for the plaintiff argued that that the plea of "reasonable grounds for suggesting" did not amount to a valid plea for the defence of justification. On this, it is important to bear in mind that there was never any suspicion and/or allegation by the defendant that the plaintiff had

insufficient funds or was incompetent to handle the water business. It is important to appreciate that the defendant merely suggested that "if" that was the case, the water management operations should be returned to the State Government. It is important not to lose sight of this point. Considered in that way, we agree with the submissions of learned counsel for the defendant that a plea of justification by way of "reasonable suggestion", at least falls within the lowest limb propounded by *Chase v. Newsgroup Newspapers Ltd (supra)*, that is to say, "there are grounds for investigating whether he/she has been responsible for such an act" (see *McDonald's Corp And Anor v. Steel and Anor* [1995] 3 All ER 615 and *Raphael Pura v. Insas Bhd And Anor* [2003] 1 CLJ 61; [2003] 1 MLJ 513). All of which leads us to conclude that on the facts of the present case the defendant's plea of "reasonable grounds for suggesting" is a valid plea for justification.

[56] As stated by the Court of Appeal, the defendant's reasonable meaning to the impugned words as pleaded meant that there were reasonable grounds to suggest that the plaintiff was facing financial difficulties and for this reason, it ought to return the water management right to the State Government. Based on this meaning of the impugned words, the defendant sought out to prove that the plaintiff was indeed facing financial difficulties; that the State Government had undertaken serious negotiations with the plaintiff and the Federal Government with the view to taking over control of the water management rights from the plaintiff; that the plaintiff had not undertaken capital expenditure due to its financial problems and that unless the plaintiff was able to secure the 37% tariff hike, it would not be able to continue with the provision of the water services.

[57] The sting of the impugned words is a finding of fact, which the Court of Appeal was fully entitled to make, considering that both parties pleaded their own meanings of the impugned words.

[58] A defendant will have sufficiently proven the defence of justification if he is able to prove the truth or the substantial truth of his own meanings of the impugned words (see *Moore v. News of the World Ltd* [1972] 1 All ER 915 and *Khalid Yusoff v. Pertubuhan Berita Nasional Malaysia (Bernama) & Ors* [2014] 8 CLJ 337, *Cheah Cheng Hoc & Ors v. Liew Yew Tiam & Ors (No 2)* [2000] 5 CLJ 475; [2000] 6 MLJ 204).

[59] The sting of the impugned words as pleaded by the defendant was that there were reasonable grounds for suggesting that the plaintiff was facing financial difficulties and as such, it should return the water management rights to the State Government. Learned counsel for the defendant submitted that the defendant had successfully proved the truth and/or the substantial truth of the sting of the impugned words. It is material to point out that the

defendant's defence of justification rested primarily on the evidence of the plaintiff's chief executive officer (PW4). PW4 admitted to the following matters during cross-examination:

(a) The Plaintiff is currently facing financial difficulties;

(b) The Plaintiff is currently facing suits by its water suppliers for non-payment of invoices;

(c) The Plaintiff has obtained a loan from the Federal Government to pay the water treatment operators because the Plaintiff are facing financial difficulties;

(d) The Plaintiff has no funds to carry out the CAPEX programmed such as the replacement of pipes and other water infrastructure in the Concession Area without having to go to the banks;

(e) Apart from the proposed tariff hike, the Plaintiff had no other back up plan to sustain its operations in the event there is a dispute on the proposed tariff hike.

(f) The proposed tariff hike is the subject of an ongoing litigation initiated by the Plaintiff; and

(g) The Federal Government has never agreed with the tariff increase proposed by the Plaintiff.

[60] The Court of Appeal held that based on the evidence of PW4 the impugned words were capable of bearing the reasonable meaning ascribed by the defendant in that the plaintiff was facing financial difficulties and for that reason, it ought to return the water management right to the State Government. In its judgment, the Court of Appeal concluded as follows:

> In our judgment, we are satisfied that on the evidence of PW4 set out above, that the impugned words are capable of bearing the reasonable meaning ascribed to the impugned words by the appellant. Accordingly, in our judgment, the appellant ought to have succeeded on the defence of justification. In any event, since the only defamatory imputations which we are prepared to ascribe to the impugned words relate to the respondent's financial status, the evidence of PW4 clearly demonstrates that the contents of the report were sufficiently true to allow the defence pursuant to section 8 of the Defamation Act 1957 to be successful in this case.

[61] On the facts of the present case, we agree with the finding of the Court of Appeal that the impugned words were capable of bearing the reasonable meaning ascribed by the defendant. The finding was clearly justified and correct based on the evidence led before the High Court. It has not been successfully shown to us that the findings of the Court of Appeal on this issue was against the weight of evidence or perverse in any way, warranting our intervention. We therefore agree with the judgment of the Court of Appeal that the defendant had succeeded in the defence of justification.

Conclusion

[62] In the result, based on all the reasons given, our answers to the questions are as follows:

(a) Answer to Question 1: *Reynolds* privilege defence is available to an individual who is not a journalist.

(b) Answer to Question 2: It is a crucial element in a defence of *Reynolds* privilege that the defendant has to show that responsible and fair steps were taken to gather, verify and publish the information; and it is not sufficient to merely have an honest belief that the statement(s) were true.

(c) Answer to Question 3: Since the *Reynolds* privilege defence failed in the present case, it is unnecessary to answer this question.

(d) Answer to Question 4: On the facts and circumstances of the present case the plea of "reasonable grounds for suggesting" does amount to a valid plea for the defence of justification.

(e) Answer to Question 5: In the circumstances of this case, it is unnecessary to answer this question.

[63] In consequence, this appeal must fail. We accordingly dismiss it.